Supreme Court, U.S.
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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1985 (3)

No. 86-410

RANDALL FRINT and YHONIS FRINT,

Petitioners,

-against-

TEXACO, INC.,

Respondent.

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

	Page
Table of Contents	1
Table of Authorities	1
Statement of the Case	2
Reasons for Granting the Writ	5

TABLE OF AUTHORITIES

	Pages
Eichel v. New York Central Railroad Co., 375 U.S. 253, 84 S.Ct. 316, 11 L.Ed.2d 307 (1963)	6, 8
Florida Physicians Insurance Reciprocal v. Stanley, 452 So.2d 514 (Fla. 1985)	5, 9
Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239 90 L.Ed. 1557 (1946)	6, 7
Tipton v. Socony Mobil Oil Company, Inc., 375 U.S. 34, 84 S.Ct. 1, 11 L.Ed. 2d 4, reh. den. 375 U.S. 936, 84 S.Ct. 328, 11 L.Ed.2d 268 (1963)	6-8
28 U.S.C. Section 2111	6
Rule 61, Federal Rules of Civil Procedure	6
Supreme Court Rule 17	6, 8-9

STATEMENT OF THE CASE

Frankly, a number of statements in Defendant's brief in opposition are just plain misleading. The evidence was indeed in irreconcilable conflict. The credibility of Defendant's liability witnesses was highly suspect.

The "rain defense" is a perfect example of the evidentiary clash. RANDALL FRINT did not testify that "it had been raining hard all night before the accident," as he is misquoted in the brief in opposition at pages one and six. On the contrary, RANDALL FRINT swore it stopped raining several hours before the accident. His testimony was corroborated by that of Professor Herbert Spiegel, a meteorologist, who examined radar pictures, weather satellite photos and official hourly precipitation reports. Mr. FRINT'S and Professor Spiegel's

testimony contradicted and impeached the testimony of all of Defendant's liability witnesses, all of whom testified falsely that it was raining shortly before the accident. Several of Defendant's liability witnesses untruthfully said it was raining at the time of the accident.

The evidence was also in conflict as to whether Defendant was on notice of the hazard. Defendant and all of its aforementioned witnesses denied any knowledge thereof. However there was evidence that the leak was open and obvious for months before the accident. Thus Defendant had constructive notice of the dangerous condition.

Defendant denied it had any duty to maintain the water line. But Defendant procured the water line and undertook to maintain it. And Defendant promised its landlord that it would "...keep the [the

leaking element in the water line] in good...condition...and make all...repairs..." Also, in the sub-lease Defendant reserved the right to control the maintenance of the leaking element.

The District Court submitted the case to the jury because the evidence was in conflict. Defendant had so much confidence that the truth would set it free that at the very end of its case it presented Tompson's blurted inadmissible, prejudicial testimony in blatant violation of Florida's collateral source rule and eliminated its alleged easy out.

Petitioners filed a motion in limine intended to keep evidence relative to collateral benefits from the jury and objected to the first improper question asked of Tompson. One of the bases for the objection was immateriality, the technical basis underlying the collateral

source rule. The record will reflect that defense counsel interrupted the objection and handed the District Court a copy of Florida Physicians Insurance Reciprocal v. Stanley, 452 So.2d 514 (Fla. 1985). The Court scanned the case, apparently concluded that the evidence was admissible, and overruled the objection.

Petitioners did not elicit June Burke's testimony relative to social security disability insurance benefits, contrary to the representation on page seven of the brief in opposition. Defendant adduced the testimony during its cross-examination.

REASONS FOR GRANTING THE WRIT

Defendant admitted the District Court erroneously admitted the evidence of collateral benefits.

Defendant does not deny unfairly

exploiting the evidence in its summation.

There are three reasons why this Court should grant the petition. First, the Court of Appeals decided the federal question relative to application of 28 U.S.C. Section 2111 and Rule 61, Federal Rules of Civil Procedure to this case in a way in conflict with Kotteakos, Tipton and Eichel. Supreme Court Rule 17.1 (c). The conflict is explained in the petition at pages thirteen through sixteen. No differences in facts or substantive laws governing liability remove this case from the control of those authorities.

Petitioners never contended the Court of Appeals misinterpreted Florida substantive law. During the oral argument Defendant admitted the District Court incorrectly applied Florida's collateral source rule. Surely the Court of Appeals did not make the same mistake.

It must have decided the error was harmless, in conflict with Tipton.

Defendant emphasizes one side of the evidence and urges this Court to forsake the Kotteakos rule and let the appellate Court's error go uncorrected.

> "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." Kotteakos v. United States, 66 S.Ct. at 1247-1248.

There is grave doubt as to whether erroneous admission of testimony as to collateral benefits amounting to about a quarter of a million dollars had "substantial influence" upon the jury. Defendant tried as hard as it could to maximize the improper influence through argument regarding double payment.

Second, the Court of Appeals decided an important question of federal law

which has not been, but should be, settled by this Court, the question being relative to application of the collateral source rule in combination with doctrine of curative admissibility. Supreme Court Rule 17.1 (a).

Arguably the second question is more important than the questions this Court decided in Tipton and Eichel, because erroneous application of the doctrine of curative admissibility could nullify, not only those decisions, but also the collateral source rule itself, to the great prejudice of untold numbers of litigants. A corrective precedent would be most important.

The appellate Court either decided the case in a way in conflict with Tipton and Eichel or it ignored the cases. Either way petition should be granted.

Third, the Court of Appeals so far

sanctioned a departure from the accepted and usual course of judicial procedure, as to call for an exercise of this Court's power of supervision. Supreme Court Rule 17.1 (a).

Petitioners preserved these issues for review by filing their motion in limine and objecting to the first improper question asked of Tompson. Tompson's really prejudicial testimony was unresponsive to the question preceeding it. At the appropriate time Petitioners objected that the evidence was immaterial. Defense counsel interrupted the objection and handed the Court a copy of the Florida Physicians Insurance Reciprocal decision. The Court was apprised of Florida's collateral source rule. Unfortunately the court misinterpreted the decision and overruled the objection. At that point a motion to

strike Tompson's blurted testimony would have been a futile and unnecessary gesture.

Subsequently defense counsel elicited June Burke's testimony relative to Social Security disability insurance benefits.

Defendant's summation was not objectionable because it was based upon the evidence erroneously admitted even though it insured and aggravated the prejudice resulting from the error.

I HEREBY CERTIFY that three true copies of the foregoing were mailed to James M. McCann, Jr., Esq., 200 S. Biscayne Blvd, Ste. 4500, Miami, FL 33131 this 17th day of October, 1986 pursuant to Supreme Court Rule 28(3).

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